STATE OF MICHIGAN

IN THE SUPREME COURT

REGENTS OF THE UNIVERSITY
OF MICHIGAN, and UNIVERSITY
OF MICHIGAN HEALTH SYSTEM,

Plaintiffs-Appellants,

v

TITAN INSURANCE COMPANY,

Defendants-Appellees.

Supreme Court No. 136905

Court of Appeals No. 276710

AMICUS CURIAE BRIEF ON BEHALF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

PROOF OF SERVICE

Prepared by:

Steven A. Hicks (P49966)
Attorney for Amicus Curiae MAJ
910 West Ottawa Street, Suite 3
Lansing, MI 48915-1742
(517) 881-5564

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES: Page(s)

STATUTES

MISCELLANEOUS

QUESTIONS PRESENTED

Amicus Curiae, Michigan Association for Justice (MAJ), adopts as questions presented the issues stated in this Court's Order granting leave to appeal, dated July 31, 2009, including whether *Liptow v State Farm Mut Auto Ins Co,* 272 Mich App 544, 726 NW2d 442 (2006), *lv den,* 477 Mich 1056, 728 NW2d 417 (2007), and *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 718 NW2d 784 (2004) were "correctly decided" by this Court.

FACTS AND PROCEEDINGS

Amicus Curiae, Michigan Association for Justice (MAJ), adopts the statement of facts and proceedings in Plaintiff-Appellant's Brief on Appeal.

AMICUS CURIAE'S INTEREST

Amicus Curiae, Michigan Association for Justice (MAJ), is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 1,700 attorneys, MAJ recognizes an obligation to assist this Court on important issues of law that substantially affect the orderly administration of justice in the courts of this state. This case presents important issues of law, the resolution of which are essential to no-fault jurisprudence in Michigan. It will have a direct and substantial impact on MAJ members' clients who are injured in motor vehicle accidents and seek to recover no-fault benefits.

INTRODUCTION

The one-year-back rule is only intended to apply to claims that could not have been filed but for the extension of the statute of limitations contained in MCL 500.3145(1). The one year back rule is not, and never has been, a stand-alone provision. Instead, it is ensconced in one of the longest uninterrupted paragraphs in the Michigan statutes.

MCL 500.3145(1) states, in full, the following:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. **However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.** The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [One Year Back Rule in Bold] [Emphasis Added].

The one year back rule is found in sentence three of this densely worded paragraph. Proper interpretation of the provision requires a review of that third sentence in context. Nevertheless, the Courts in Michigan have long interpreted without reference to the other provisions surrounding it in that same paragraph, thus leading to the erroneous interpretation that it is applicable in all cases. That view of MCL 500.3145(1) is incorrect.

Even assuming it is merely a damages limitation, e.g., a cap, and not a true statute of limitation, in the traditional sense, as the majority concluded in *Cameron*, *supra*, its

application as a cap on damages is limited to situations where there is no legal tolling. When interpreted in context, the one year back rule was only intended to apply in cases that were only able to be filed because an insurer had been given timely notice of the claim or had made payment on the claim, and the lawsuit was filed within one year of the "most recent allowable expense". The one year back rule was never intended to apply to lawsuits that did not rely upon that extension of time given by the second sentence of MCL 500,3145(1), whether the lawsuit was brought by a minor, a legally incompetent person, or pursuant to some other form of statutory tolling such as the assigned claims tolling found in MCL 500.3174 or reimbursement for care in state-run institutions, as in this case. In short, the one year back rule only applies to cases that do not involve a minor or incompetent person (or some other form of statutory tolling such as for assigned claims under MCL 500.3174 or reimbursement for care in state-run institutions, as in this case).

Amicus curiae MAJ recognizes that this construction runs counter to how the one year back rule has historically been interpreted and applied by Michigan Courts, precisely because the one year back rule has long been discussed as if it stands alone. However, when the text of MCL 500.3145(1) is closely analyzed, the language and structure demonstrate that the one-year-back rule applies only to cases where the lawsuit is only timely under MCL 3145(1) because it was commenced "within 1 year of the most recent allowable expense", and was not filed within one year of the date the accident occurred.

Why is that the case? Because the one year back rule is separated from the sentence preceding it, e.g., the statutory extension of no-fault's lawsuit filing requirements, by a single word pivotal to understanding MCL 500.3145(1) – that small word is "however". In using the word "however", the Legislature was clearly saying that the statutory extension

in the preceding sentence came with one proviso, namely, the one year back rule, which would then be applied to all claimants using the statutory extension to file a timely lawsuit.

The Legislature chose to start the one year back rule contained in MCL 500.3145(1) with the preface "however". As a conjunction, the word "however" requires that the two sentences be read together. Its synonym, "nevertheless", is defined as "in spite of what has been said." *Random House American Dictionary,* New Revised Edition (1990). In this context, that meaning describes well the relationship between these two critical sentences.

To contend that the word, "however", as used in MCL 500.3145(1), creates a stand-alone "one year back rule" renders the word "however" superfluous or nugatory. Statutes must be interpreted to provide meaning to every word used. Interpretations that render words or phrases meaningless are prohibited when there is an interpretation that gives meaning to each word. *Cameron, supra.* Proper interpretation of MCL 500.3145(1) would give meaning to each word in that subsection. Proper interpretation of MCL 500.3145(1) must recognize that the word "however" creates a condition precedent to the one year back rule's application. That condition is set forth in the immediately preceding sentence.

ACF claimants and state-run hospitals, as well as minors and incompetent persons, do not use the statutory extension contained within MCL 500.3145(1), because they benefit from other tolling provisions found in the RJA or elsewhere within the No-Fault Act. MCL 500.3174. Because such claimants do not utilize the statutory extension found in MCL 500.3145(1), the one year back rule in that same subsection does not apply to their claims.

ARGUMENT

THE ONE YEAR BACK RULE APPLIES ONLY WHEN THE CLAIMANT USES THE STATUTORY EXTENSION OF TIME FOR FILING A LAWSUIT WHICH IMMEDIATELY PRECEDES THE ONE YEAR BACK RULE IN MCL 500.3145(1) BUT DOES NOT APPLY TO CASES WHERE THE DEADLINE FOR FILING IS OTHERWISE TOLLED.

In Michigan, a no-fault claimant can file a lawsuit years after the accident, so long as it is filed within one year of the most recent allowable expense or work loss. MCL 500.3145(1) expressly provides that extension to the statute of limitations in no-fault cases. The "one year back rule, however, limits the benefit of that statutory extension by limiting the damages recoverable when the statutory extension is used to allowable expenses incurred within the year preceding the filing of a lawsuit. In short, the lawsuit is timely under the statutory extension, but the damages are also limited by the one year back rule.

The one year back rule makes sense in the context of the one year statute of limitations provided in the No-Fault Act. Claimants must ordinarily file a lawsuit within one year of the date of the accident. The one year back rule provides claimants who are paid benefits on a timely basis for the first year or more of their claim (and have no reason to file a lawsuit) with the same statute of limitation as claimants who believe they were wrongfully denied benefits at the outset, namely, one year to file a lawsuit. Without the one year back rule, however, insurers would be penalized for paying claims initially. Without the one year back rule, insurers would have an incentive to deny claims from the start. MCL 500.3145(1), when properly read, is designed to balance the rights of claimants and insurers. However, the law has always treated certain classes of claimants differently. Under the RJA, minor and protected persons are treated differently. The same is true

under the RJA for those persons who are provided care in government-run facilities. The same can be said under the No-Fault Act for claims made under the assigned claims plan. The Legislature has made exceptions to the statute of limitations for certain claimants and the one year back rule does not affect such provisions – it only limits no-fault claims when the statutory extension of time for filing a lawsuit under MCL 500.3145(1) is employed.

Minors and incompetent persons, however, do not utilize the statutory extension to bring their lawsuits. Minors and incompetent persons are entitled to bring no-fault actions at any time because of RJA tolling. Similarly, minors and incompetent persons, as recognized in *Cameron, supra*, can provide notice of the claim after one year has passed, unlike other claimants, because of RJA tolling. Minors and incompetents do not need the statutory extension, and thus, its caveat, the one year back rule, does not apply to them. The same is true can be said for ACF claimants and those cared for in state-run facilities.

In analyzing MCL 500.3145(1), it is helpful to break down the language sentence by sentence and conveniently label each sentence for the purposes of further discussion. The first sentence of MCL 500.3145(1) sets forth a **"notice requirement"**, by stating that:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury.

Simply put, this sentence requires notice within 1 year (unless benefits have been paid). The last two sentences of MCL 500.3145(1) provide more specifics on the notice required.

The second sentence of MCL 500.3145(1) can be referred to colloquially as the **"statutory extension"** because it provides that where "notice has been given" or "payment has been made", a lawsuit can be filed "at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred". It states as follows:

> If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred.

The statutory extension is then immediately followed by the **one year back rule** provision, which is the third sentence of MCL 500.3145(1). It states the following:

> However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. [Emphasis added].

As noted previously, the balance of the paragraph is devoted to the notice requirements. While significant in other cases where notice is at issue, the last two sentences are not important in this case which concerns the one year back rule, not the notice requirements.

The key language in MCL 500.3145(1), when it comes to deciding this case, is contained in the second and third sentences. If the second sentence is understood as a statutory extension, which is then reined in by the second sentence, e.g,. the one year back rule, the Legislature's intent becomes much clearer. Simply put, the Legislature intended to be liberal in permitting lawsuits to be brought where notice had been given or benefits paid, but also wanted some limitation on such claims via the one year back rule. The Legislature never intended to supplant existing tolling provisions in the RJA. The one year back rule was never meant to be a stand-alone provision. Debating whether the one

year back rule is a damages limitation or statute of limitations misses the point. The point is that – whatever the rule is called, it does not apply to claims that are otherwise tolled.

As the statute plainly shows, the one year back rule comes immediately after the statutory extension to the normal "one year after the accident" limitations period. It does not stand alone. To the contrary, it is preceded by the word "however," a term that signals that it is only a qualification to the preceding sentence. Thus, the one-year-back rule is not a general rule applicable in all cases; it only applies in the limited, qualified circumstances contemplated and permitted under MCL 500.3145 where suits are timely filed more than one year of the accident date via the statutory extension. Given the statute's wording, the Legislature did not intend to cap damages in all timely filed first-party, no-fault cases, but only in those cases timely filed under the statutory extension found in MCL 500.3145(1). This Court can correct this misreading of the statute's language, by reversing *Cameron, supra*, and by adopting in this case a truly text-based interpretation of MCL 500.3145(1).

In this case, the plaintiff claims it is entitled to additional time to file its lawsuit under MCL 600.5821(4), because, under that statutory provision, the government is not subject to such limitations in lawsuits for reimbursement of the cost of care, recovery or maintenance of persons in publicly run hospitals, homes, schools or other state institutions. In other words, as with RJA tolling, or any other form of statutory tolling, the plaintiff claims that it is free of such limitations on its ability to seek reimbursement for such expenditures.

The plaintiff's argument only underscores the main point that is being made in this amicus brief, which is that the one year back rule does not apply to the claim, unless the statutory extension in MCL 500.3145(1) is used to establish the lawsuit was timely filed. Stated otherwise, the case at bar was timely filed not because it was brought within one

year of the most recent allowable expense having been incurred and because notice had been given or a payment had been made under the sentence immediately preceding the one-year-back rule, but because it was not subject to limitations under MCL 600.5821(4).

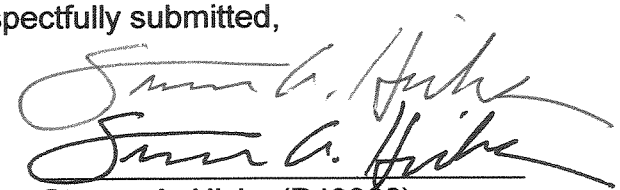
CONCLUSION

The one-year-back rule does not apply here. The plaintiff is not barred by the one year back rule from pursuing its claims. The one year back is not, and never has been, a stand-alone provision precluding recovery of damages in cases when the limitations period is otherwise tolled. It applies only to lawsuits timely filed by way of the statutory extension. While other arguments may limit the rule's application even in those cases, i.e., equitable tolling, the one year back rule clearly has no application to cases in which the statute of limitations is already tolled by some other statutory section in the RJA or the No-Fault Act.

RELIEF REQUESTED

WHEREFORE, Amicus Curiae, Michigan Association for Justice (MAJ), respectfully requests that this Court reverse the lower courts' ruling in this case, overturn the prior rulings in *Liptow* and *Cameron,* because both mistakenly apply the one year back rule, and clarify that the one year back rule applies only to cases utilizing the statutory extension.

Respectfully submitted,

By: 

Steven A. Hicks (P49966)
Attorney for Amicus Curiae MAJ
910 West Ottawa Street, Suite 3
Lansing, MI 48915-1742
(517) 881-5564

Date: March 5, 2010